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No. 2845

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL CALLAHAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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The Case.

The defendant in error was accused in an indictment by the grand jury, at Fairbanks, Alaska, charging:

> "That said Daniel Callahan on June 25, 1915, at Fairbanks * * * did then and there wilfully, unlawfully, and feloniously, carnally know and abuse one *Grace Carey,* a female child, under the age of 16 years, to wit: of the age of 14 years * * *" (Tr. 3).

The plaintiff in error pleaded "not guilty", and the trial to the jury took place March 22, 1916 (Tr. 35); the jury rendered a verdict finding him guilty of the crime of rape on March 25, 1916 (Tr. 23); he moved for a new trial and in arrest of

judgment which motions were denied (Tr. 24-28); on April 11, 1916, judgment was rendered and he was sentenced to the United States penitentiary for *twelve years* (Tr. 31-33); to reverse this judgment this writ was sued out.

Argument.

I.

The indictment is *not* sufficient to charge the crime of constructive rape, under Section 1894, Compiled Laws of Alaska, because the carnal knowing is not alleged to have been *"with her consent"*. Section 1894 reads:

> "That whoever has carnal knowledge of a female person, forcibly and against her will, *or,* being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, *with her consent,* is guilty of rape."

The indictment omits to charge that the carnal knowing and abuse were *"with her consent",* as Section 1894 expressly states; the defendant moved to set aside and demurred to the indictment (Tr. 7-11); the Court overruled the motion and demurrer.

Until the case of the Government was all in evidence, it was impossible for defendant or his counsel to know whether the Government would prove a *forcible* ravishment or carnal intercourse *"with her consent",* and the rules of evidence vary

the proof in the two cases, in *forcible* ravishment, the *"outcry"* and *"recent complaint"*, in carnal knowledge with her consent, there is no "recent complaint", but mere hearsay, gossip, tattle or brag of what she and he had willingly done; and the defendant would have difficulty knowing what case he would have to prepare to defend against.

State v. Carl, 71 Ohio St. 259, 266;
s. c., 73 N. E. St. 259, 266;
State v. Hensley, 75 Ohio St. 255, 267;
Hubert v. State, 104 N. W. 276;
State v. Lee Yan, 10 Pac. 365;
State v. Daly, 18 Pac. 357;
State v. Birchand, 59 Pac. 468, 471;
State v. Haskinson, 96 Pac. 138;
People v. Wilmot, 72 Pac. 838;
State v. Giffin, 86 Pac. 951, 954.

The charge might even be *"fornication"*, under Section 318 Federal Criminal Code, and it even might be *"incest"*.

1 Wigmore on Ev., Sec. 402 (3);
State v. White, 25 Pac. 93.

The indictment was therefore insufficient under the law, and the conviction and judgment cannot be sustained.

II.

The Court *denied* defendant *a public trial* of his case, in violation of Article VI of the Amendments to the Constitution of the United States, providing:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public trial* * * *."

The record here shows:

> "On the Court's own motion, the Court ordered that *all* persons *of the general public,* not properly having business before the Court, be excluded from the courtroom during the trial of this cause, to which ruling counsel for the defendant notes an exception, which exception was allowed" (Tr. 124).

The defendant requested the Court to change this order and allow an open trial. The Court refused and defendant again excepted (Tr. 35). And the defendant assigns error in this ruling (Tr. 124).

In Reagan v. U. S., 202 Fed. 488, this Court very clearly distinguished the power of the Court to exclude some part of the general public, where it appeared from the record that *the reasons* the Court had for such exclusion were given and seemed sufficient, and there was no showing by the defendant of any injury therefrom.

But in *this* case, the Court gave *no reason* for the exclusion of the general public; and from the character of the prosecutrix, *Grace Carey,* and her so-called corroborating witness, *Laura Herrington,* as appearing from *this* record, and taking judicial notice of the *same* Grace Carey and the *same* Laura Herrington as they appear before Your

Honors in the cases now under submission before you, viz: Wooldridge v. U. S., No. 2839 (which you have already decided and *reversed*), the *same* Laura Herrington is prosecutrix (Tr. p. 75), and Rose v. U. S., No. 2819, the *same* Grace Carey is prosecutrix (Tr. 34); and the remarkable resemblance of the testimony in *this* case and that in the other *two* cases before you, we believe that justice to the defendant here, sentenced to *twelve years* imprisonment, urges a reconsideration of *this* point by Your Honors, as we feel satisfied it is materially different and distinguishable from the case before you in Reagan v. U. S., 202 Fed. 488, where the trial Court there had sufficient reasons and expressly stated its reasons for excluding the morbidly curious, etc., portion of the general public from the trial, while in *this* case the Court neither stated nor does the record show there existed any reason for the order of exclusion, and especially because in this case defendant's counsel specially requested the Court to set aside its order excluding the public and asked that the Court grant defendant a public trial (Tr. 35).

There seems to be no possible doubt but that this case was trumped up, that Grace Carey and Laura Herrington were *decoys* and they, with others (as appears from the other two cases before you), were playing the *"badger game"* on defendant, and that the crime and acts charged against defendant were never committed by him.

III.

The Court admitted the evidence of this same *Laura Herrington,* over the *repeated objections and exceptions* of the defendant as follows:

She had testified without objection that she was then *fourteen* years old, that she was acquainted with the defendant and that she saw Grace Carey (no date being stated by the witness, the rape being charged in the indictment as occurring *on* June 25, 1915, Tr. 3) coming from Callahan's house (Tr. 43), and was then asked:

> "Q. Just tell what occurred between you and Grace at that time (Tr. 43). Just state what Grace said to you, and what was done.
>
> A. She *told* me that she did something with Dan to get the money. (Motion to strike out denied and exception; Tr. 44.)
>
> Q. What money are you referring to?
>
> A. The money he gave her. (Objection and motion to strike out, both overruled; Tr. 44.)
>
> Q. What did she show you? Did she show you anything there? (Objection and exception.)
>
> A. Yes.
>
> Q. What did she show you? (Objection and exception; Tr. 45.)
>
> A. Three dollars.
>
> Q. What did she say to you, the exact words that she said, when she showed you the three dollars. (Objection and exception; Tr. 45.)
>
> A. She said he did something to her. That Dan had pushed her."

We respectfully submit, that this evidence of Laura Herrington as to what Grace Carey *told*

her is not "recent complaint", but mere narrative, gossip and tattle, the purest kind of *hearsay;* and its injurious and prejudicial effect is obvious.

In ordinary cases of rape, and the same rule obtains in constructive rape, it is permitted that third persons might testify to *the complaint* of her abuse, where recently made; but this is not evidence *of complaint,* but on the contrary a mere narrative by Grace Carey to her chum Laura Herrington of a pleasurable occurrence entirely to her satisfaction; and not of an abuse, injury or insult perpetrated upon her; *"a casual conversation",* as said by the Court in People v. Wilmot, 139 Cal. 103, 106.

In People v. Wilmot, 139 Cal. 103, 105-108, the Court, by Chief Justice Angellotti, very fully and carefully considered and stated the injurious and inadmissable character of very similar evidence; and we therefore quote from that case.

> People v. Wilmot, 139 Cal. 103.
>
> "Numerous errors in the rulings of the court in the admission and rejection of testimony are alleged, the *main question* raised thereby being as to the *admission* by the court of evidence *of statements of the prosecutrix to others* as to the commission of the offense charged. It is well settled that in prosecutions for rape the people may prove that the injured party made complaint of the injury while it is recent, and that this may be shown both by the prosecutrix and those to whom the complaint is made. While such evidence would ordinarily be hearsay, its admission in this class of cases is justified upon the ground that in such cases, *when*

restricted to the fact of complaint, it is in the strictest sense original evidence. It is natural that a woman violently assaulted and outraged should, at the earliest moment practicable, make complaint of her injury, and her omission to do so, especially to those related to her, would be regarded as strong evidence against her claim that she was an unwilling victim. Hence the fact that she did immediately make complaint has generally been held to be original evidence, corroborating her testimony that the act of the defendant was against her will. The *reason for the rule* admitting such testimony would appear to be *wanting* in the case where the act is accomplished *with a female who fully understands* the nature thereof, and freely and voluntarily submits thereto. Doubtless, however, evidence of the fact of complaint of injury on the part of one under the age of legal consent would in most cases be competent, and this court has in this respect made no distinction between cases where there was actual resistance and those where resistance and non-consent were conclusively inferred by the law. (See People vs. Baldwin, 117 Cal. 251; People vs. Barney, 114 Cal. 554.) The *rule* enunciated *by the authorities generally,* and by *all* the decisions in this state, is in all cases to admit evidence of the fact of complaint, and *in no case to admit anything more.* (People vs. Mayes, 66 Cal. 597; People vs. Tierney, 67 Cal. 55; People vs. Snyder, 75 Cal. 323; People vs. Stewart, 97 Cal. 241; People vs. Barney, 114 Cal. 554; People vs. Baldwin, 117 Cal. 251; People vs. Lambert, 120 Cal. 171.) For, as said by Greenleaf: 'The evidence when *restricted* to this extent is not hearsay, but in the strictest sense original evidence. *When,* however, these limits are *exceeded, it becomes hearsay in a very objectionable form.*' It is clear to allow any mere statement of the prosecutrix as to

the details of the affair, or as to the name of the person accused by her, to be given in evidence *would be to allow hearsay evidence to prove the offense.* (See People vs. Lambert, 120 Cal. 171.) It is likewise *clear* that any mere *statement of the prosecutrix, made in casual conversation with her friends, does not constitute the complaint* impelled by physical pain or outraged feelings contemplated by the rule.

"The record in this case shows that the prosecutrix was asked, after having testified to the circumstances of the affair, 'Did you ever tell this to anybody?' and answered over objection and exception, 'I told it to Alice Fiese.' Alice was a playmate of prosecutrix, and prosecutrix seemed to have communicated the information to her as a mere matter of gossip. There was no complaint apparent. She was then asked, 'Anybody else?' and answered over objection and exception, 'I told it to Miss Fannie Wyatt.' She stated that she also told others. Miss Wyatt, who was a kindergarten teacher, was subsequently called, and stated that about six days after the date of the alleged offense she had a conversation with the prosecutrix. She was then asked by the district attorney whether at that time anything was said by the prosecutrix on the subject of her relations with the defendant, and answered, 'Yes, sir.' It is doubtful from the record whether the objection to this question made by defendant was made before or after answer. The answer was followed by a further question on the part of the district attorney, as follows: 'Did she say whether or not this defendant had had sexual intercourse with her?' This was objected to by defendant, whereupon the following occurred:

"The COURT. The rule in such case is, that particular statements of the parties are not

admissible on the part of the prosecutrix, but the fact that the fact of an assault was communicated to another is always admissible.

"DISTRICT ATTORNEY. That is all I ask for.

"The COURT. The form of your question goes further than that. Answer this last question.

"Exception taken by defendant's counsel.

"WITNESS. She did speak about it.

"Q. About five days after? A. Yes, sir.

"Q. Did she say that *he* had?

"A. She *did say* that *he* had on the 9th day of May.

"The answer of the learned attorney-general to the claim of defendant, that this evidence was improperly admitted, is exceedingly technical, but it is probably the only answer available. That *the testimony* elicited *was incompetent* is very clear, and that it *must have substantially affected defendant's cause* is likewise clear. The attorney-general contends that the first question set forth was modified by the suggestion of the court and the answer of the district attorney, but it is plain that the court, over the objection of defendant, directed the witness to answer the question asked by the district attorney, and that she did answer it. The subsequent questions asked were along the same line as the first, for the purpose of obtaining the information sought to be elicited by such question, and under the circumstances shown by the record should be deemed covered by the objection and exception. Throughout the record it is apparent that the counsel for defendant objected to the admission of any testimony of statements by the prosecutrix to others, and sought diligently to exclude the same. Under the circumstances shown, we feel that *it would be trifling with justice to hold* that all of this testimony given by Miss Wyatt was not covered by the objection and exception of defendant.

> "As was said by this court, in People vs. Baldwin, 117 Cal. 251, *'in this class of prosecutions, the defendant,* owing to natural instincts and laudable sentiments on the part of the jury and the usual circumstances of isolation of the parties involved at the commission of the offense, *is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right'.*" (Italics ours.)

Also: State v. Sargent, 49 Pac. (Or.) 889, Judge Wolverton rendering the opinion.

Also:

> People v. Lambert, 120 Cal. 170, 172;
>
> People v. Mayes, 66 Cal. 597;
>
> People v. McGilver, 67 Cal. 55.

In Vol. 10, Encyclopaedia of Evidence, page 587, the rule is thus stated:

> "After the prosecutrix has testified to the commission of the outrage upon her, it is competent for the prosecution to prove in corroboration of her testimony as to the main fact, either by her or other witnesses that recently after the perpetration of the offense, she *made complaint* to those to whom complaint of such an occurrence would naturally be made, but on direct examination, such testimony is confined to the bare fact of complaint, and neither the details of the occurrence, nor the name of the offender, can be proved."

Citing *a multitude* of cases from nearly every Court in the Union.

IV.

The Court erred in allowing the prosecutrix *Grace Carey* to testify, over defendant's objection and exception:

> "Q. Tell the jury *who* was the *first* man that ever had sexual intercourse with you?
> A. Dan Callahan.
> Q. Where did that occur?
> A. Over to Dan Callahan's house.
> Q. Did he give you anything particular after that?
> A. Yes. He gave me twenty-five cents" (Tr. 41).

This evidence, as to "who was the *first* man that ever had sexual intercourse with her", did not in any manner fall under the rule admitting previous acts of a similar nature in order to show a disposition to commit the act in question.

She testified: "I was only about *nine* years old, about ten; either nine or ten" at that time (Tr. 41), and was consequently at least *five* years *before* the offense for which he was indicted.

Its effect, as proving her *seduction* by Callahan at that age—nine years, was necessarily highly injurious and prejudicial before the jury, and was not competent or relevant.

V.

There is *no evidence* in this record from *Grace Carey* even, that Dan Callahan ever *carnally knew* and abused her.

Nowhere does she testify *herself,* that Dan Callahan had *sexual intercourse* with her. She, Grace Carey, testified only that she *told* Laura Herrington that Dan Callahan "pushed her" (Tr. 40), and Laura Herrington said: "She said that Dan had *pushed her"* (Tr. 45); and we do not believe that this Court, in the absence of some evidence on the record, will take judicial notice that *"pushed her"* means that he had *"sexual intercourse"* with her.

On direct examination by the district attorney, Mr. Roth, Grace Carey said:

> "Then he had *full sexual intercourse,* and I got up and put my drawers back on and I went home" (Tr. 40).

On cross-examination she testified:

> "Q. Who *told* you to say that Dan Callahan had *full sexual intercourse* with you?
> A. *Mr. Roth told me the word;* that was all.
> Q. Mr. Roth told you the word?
> A. Yes, I asked him the word.
> Q. You asked him the word?
> A. Yes.
> Q. *When* did you ask him that?
> A. *Today.*
> Q. You never knew that term before?
> A. *I never knew that word, no"* (Tr. 40).

There is not a word of evidence in this case that Dan Callahan ever "carnally knew" and "abused" Grace Carey. The only testimony of *her own* is: "Well, I went in and I took my drawers off and I went on the bed and then Dan got on top of me" (Tr. 40).

In an ordinary *rape* case, there is not a Court in the land that has ever held that the crime of *rape* was committed, unless the *evidence* showed that the male *inserted his penis in* the female to some extent, however slight. Here defendant is charged with *rape,* and we respectfully submit, that there is not any evidence in this record *from Grace Carey* that Dan Callahan ever, to the slightest extent, *inserted* his penis in the sexual organ of Grace Carey.

In 33 Cyc. p. 1421, it is stated, with the authorities:

> "Carnal knowledge is also necessary, as a rule, under statutes punishing carnal abuse of female children. In such statute carnal 'abuse' means abuse of the sexual organ by intercourse or the attempt to have the same."
>
> Also People v. Howard, 143 Cal. 316.

The Court charged the jury on "penetration", although that word and the word "penis" also used in the charge, are not in the evidence (Tr. 132).

The law is clearly stated in 33 Cyc. p. 1422, citing a multitude of authorities (in fact there are none to the contrary), as follows:

> "There can be *no carnal* knowledge *without penetration.* Mere actual contact of the sexual organs is not sufficient. The slightest penetration, however, of the body of the female by the sexual organ of the male is sufficient."

Although the district attorney *told* her to say *"sexual intercourse"* (Tr. 42), and he later asked

her *three* questions (Tr. 40, 41) *containing* the words "sexual intercourse", she never used these words in any of her answers to these questions.

Just as clearly does this record *fail* to show that Dan Callahan ever sexually penetrated Grace Carey, as did the record in the *Wooldridge* case (just decided by this Court and *reversed*) fail, as you correctly held, to show any *overt act* of attempt to rape Laura Herrington, Grace Carey's chum. Grace Carey said:

> "I showed Laura Herrington the $3 Dan gave me, and told her what he gave it to me for. I told her that *he had pushed me* for it" (Tr. 407).

She did not say *what* she meant or understood by "pushed"; she did not say *what* she *understood* by "sexual intercourse", which the district attorney *told* her to say (Tr. 42); nor did she say what "sexual intercourse" was or meant, and as she had already stated *what Dan did,* viz: "Well, I went in and I took my drawers off and I went on the bed and then Dan got on top of me" (Tr. 40), that undoubtedly is what she referred to and meant, and as that action does not mean or show *penetration* it could not mean that.

The Court *charged* the jury (Tr. 111):

> "You are instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant Daniel Callahan, * * * *on* the 25th day of June, 1915, did have carnal knowledge of Grace Carey and *did penetrate the female organ of Grace*

> *Carey with his male member or penis,* * * * you will find the defendant guilty of the crime of rape as charged in the indictment" (Tr. 111; instruction 25).

Nowhere in this record, except in this instruction, can the word *"penetrate"* or the word *"penis",* be found; and we submit no words of Grace Carey contain these words; the words "sexual intercourse", the district attorney *told* Grace Carey to use and state in her evidence (Tr. 42).

VI.

The Court erred to the injury and prejudice of the defendant's case before the jury in permitting the witness *Laura Herrington* to testify, over the objection and exception of defendant:

> "Q. Did you ever have a conversation with Dan Callahan, in his house, about Grace Carey?
> A. Yes.
> Q. When was that? How old were you when that conversation took place?
> A. *Twelve* years old.
> Q. Just tell the jury what Dan Callahan said to you at that time about Grace Carey?
> A. He said he did that to Grace and that she was not afraid" (Tr. 45-46).

Laura Herrington testified she was *then fourteen* years old, at the time of the trial (Tr. 43). So that the statement of Callahan she testified to was *two* years *before* the trial; as she testified on

the trial she was *twelve* when Callahan made that statement to her (Tr. 46).

There is no rule of law under which this testimony was admissible against the defendant charged here with a crime alleged to have been committed in 1915, by evidence of something it is asserted he told Laura two years before.

VII.

The defendant is charged with rape on the person of Grace Carey, *committed on the twenty-fifth* day of June, 1915 (Tr. 3; instructions to jury, Tr. 101).

The Court instructed the jury that

> "nevertheless, where, as in this case, the prosecution by its evidence has elected to prove *an offense upon a certain day,* to wit: *the twenty-fifth* day of June, 1915, *they are bound to prove* to your satisfaction, beyond a reasonable doubt, that such *offense was committed* by the defendant *at the time* and place testified to by the witnesses in this case, and in the manner and form as charged in the indictment, *before you can find the defendant guilty*" (Tr. 112).

There is absolutely *no evidence* in this case that the asserted crime of rape was committed *on* June *twenty-fifth,* 1915; the *instruction* of the Court is *the law of the case,* and the evidence is therefore not sufficient to sustain the conviction.

Grace Carey, the prosecutrix, did *not* testify that Dan Callahan had sexual intercourse with

her on June *twenty-fifth*. She testified she went to Callahan's residence "About the latter part of June. Around there somewhere" (Tr. 38).

She said it was after the carnival; she did not know how long, just a few days (Tr. 39); but there is no evidence in the record of the *date when* the carnal knowing occurred.

Laura Herrington testified that she saw Grace Carey "the latter part of last June", that she could not fix the time; said "I don't remember"; that she saw her coming from (not out of) Dan Callahan's house (Tr. 43).

Joe Mack, in answer to a question by the district attorney putting the time and hour as a part of the question, thus:

> "Q. Where were you on the 25th of June, 1915, between 12 and 1 o'clock?
> A. I was in front of Mr. Healey's house, in the garden, watering the plants.
> Q. Now, where did Grace Carey go when you first saw her? How did she go?
> A. Well, she came walking up there towards—as far as Callahan's place, then she kind of stalled; then she came over to me and got some flowers. Some pansies. I gave them to her. She stalled around there.
> Q. *Where did she go after* she left there?
> A. I didn't see that—where she went to, because I went away" (Tr. 49).

So that there is no evidence in this record that the defendant Callahan had sexual intercourse with Grace Carey on June 25, 1915; and the evidence, under the instruction of the Court, which

is the law of the case for the jury, was absolutely insufficient to support the verdict of guilty against Callahan.

In conclusion, we respectfully submit that upon the evidence disclosed by this record, the defendant has been erroneously convicted of rape and sentenced to *twelve years* imprisonment; and that the judgment should be reversed and a new trial granted the defendant.

Dated, San Francisco,
December 15, 1916.

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